

3 September 1997

Re: NEPA Technical Inquiry 0136 - Requirement to Perform Phase I ESA

Dear NEPA Call-In User:

This letter is in response to your August 14, 1997 request for information about Phase I Environmental Site Assessments (ESAs). Specifically, you would like to know if you are required to do a Phase I ESA on a renovation project at a port of entry in California.

SUMMARY OF FINDINGS

NEPA Call-In determined that there is no regulatory requirement to perform a Phase I ESA for your project and no GSA policy requiring the studies. Phase I ESAs are used to evaluate environmental conditions at a site, and limit GSA's potential liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). GSA legal counsel concurred that there is no legal requirement to perform a Phase I ESA, although the Regional Counsel's Office can require that one be performed on a case by case basis.

DETAILED FINDINGS

NEPA Call-In reviewed Title 40 Code of Federal Regulations (CFR) and the California Code of Regulations (CCR). NEPA Call-In found no Federal regulation requiring a Phase I ESA. Title 20 CCR, "Public Utilities and Energy," Division 2, Chapter 5, "Site Certification," required a Phase I ESA only for proposed power plant sites.

NEPA Call-In also reviewed the PBS NEPA Desk Guide, Final Draft, May 16, 1997. The Desk Guide has been approved by the Council on Environmental Quality (CEQ), and is interim guidance for NEPA compliance within GSA. Chapter 9, "Special Studies," Section 9.5, "Due Diligence Reports" (enclosed), discusses ESAs. This section states due diligence reports (ESAs) are used by GSA to identify "recognized environmental conditions" at a site prior to purchase or development. "Recognized environmental conditions" refers to the "presence or likely presence of any hazardous substances covered under the terms of CERCLA, as well as petroleum products, asbestos, lead-based paint, radon, and other environmental hazards covered under other laws or industry practice." Conducting a Phase I ESA helps GSA to establish the "innocent landowner" defense under CERCLA; therefore limiting GSA's liability if hazardous materials are discovered in the future.

NEPA Call-In contacted the Senior Assistant General Counsel, Real Property Disposal, Offices of General Counsel, GSA National Office. To the Senior Assistant General Counsel's knowledge, there are no environmental regulations requiring you to perform a Phase I ESA for any project. However, the Senior Assistant General Counsel stated ESAs are a useful tool to determine if contamination exists on a property prior to its purchase. ESAs can also be performed to determine if there is contamination at a site after purchase although this is not their primary purpose. Because you are renovating a building, the Senior Assistant General Counsel stated an ESA or similar study could provide information about the presence of asbestos, lead-based paint, or other substance in the building. This information, if not already known, could

affect your renovation. The Senior Assistant General Counsel also stated Regional Counsel can require you to perform a Phase I ESA on a case by case basis. The Senior Assistant General Counsel suggested contacting GSA's Regional Counsel's Office for Region 9 to determine if they would require you to perform a Phase I ESA for your project. In a follow-up phone conversation with you, you stated this issue has already been resolved with the Regional Counsel's Office for Region 9.

The materials in this TI have been prepared for use by GSA employees and contractors and are made available at this site only to permit the general public to learn more about NEPA. The information is not intended to constitute legal advice or substitute for obtaining legal advice from an attorney licensed in your state and may or may not reflect the most current legal developments. Readers should also be aware that this response is based upon laws, regulations, and policies in place at the time it was prepared and that this response will not be updated to reflect changes to those laws, regulations and policies.

Sincerely,

(Original Signed)

NEPA Call-In Researcher